counsel could have rephrased the question or explained to the district court that he was inquiring about the invoices at issue in this case. The district court therefore did not unduly restrict petitioner's right to cross-examine Kushiyama on that point. See *ibid.* Although petitioner contends (Pet. 24-25) that the question was relevant even if it did refer to invoices prepared for others, petitioner did not present that argument to the district court or to the court of appeals, and this Court should not pass on that fact-bound claim in the first instance. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998).

3. Finally, petitioner contends (Pet. 28-29) that the forfeiture of the entire $495,814.80 loan from GECC violates the Eighth Amendment's Excessive Fines Clause as interpreted in *United States* v. *Bajakajian*, 524 U.S. 321 (1998). In *Bajakajian*, this Court held that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Id.* at 334. In applying that test, the Court considered (1) whether the offense leading to forfeiture was related to other illegal activities; (2) whether the defendant fit into the class of persons for whom the statute was designed; (3) the other possible penalties for the offense; and (4) the harm caused by the offense. *Id.* at 336-340.

As petitioner notes, the Eighth Circuit has concluded that under *Bajakajian* a forfeiture order may be excessive under the Eighth Amendment if it is not reduced when a defendant has returned a portion of the illegally obtained assets. See *United States* v. *Hawkey*, 148 F.3d 920, 928 (1998). In this case, however, the court of appeals did not address whether the forfeiture order violated the Eighth Amendment; the only argument that

petitioner made and that the court considered about forfeiture was whether 18 U.S.C. 982(a)(2) entitled petitioner to a credit. Pet. App. A34. The court of appeals' decision therefore does not present a conflict warranting this Court's review. Moreover, this Court should not consider petitioner's Eighth Amendment claim in the first instance. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2005

Petitioner does not argue in this Court that he is entitled to a credit under 18 U.S.C. 982(a)(2).

(2)

FILED
SEP 14 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 04-1468

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL BOULWARE, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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REPLY BRIEF

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ARGUMENT

1. Petitioner contends this Court should grant a writ of certiorari to determine whether the government is precluded from relitigating the ownership of property in a federal criminal tax prosecution which was the subject of a bona fide state adversary proceeding, resulting in a civil judgment that determined the property interests among the litigants. This question was left unresolved in *Commissioner v. Estate of Bosch,* 387 U.S. 456 (1967) outside of the estate-tax context.

The government's brief in opposition argues that this question is not presented in this case, noting that the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") held that, even assuming that a state court's determination of ownership was binding in subsequent tax cases, the Hawaii judgment did not resolve whether the money belonged to Hawaiian Isles Enterprises, Inc. ("HIE") or petitioner because that determination was not at issue in the lawsuit. Therefore, the significance of *Bosch* outside the estate-tax context is not at issue in this case. Opp. Br. 6-7.

While recognizing that "[t]he state court did find that the money in question belonged to HIE and that Lee had been and was holding it in 'constructive trust' for HIE," the Ninth Circuit nevertheless erroneously concluded that "the ownership of the money as between Boulware and HIE does not appear to have been subject to adversarial testing." Pet. App. A16. The Ninth Circuit overlooked the fact that in the state action, the litigants were Jin Sook Lee, HIE and petitioner, each represented by separate counsel, and the heart of the controversy was the ownership of the monies and properties at issue.

The Hawaii judgment resulted from an adversarial proceeding initiated by Lee, prior to petitioner's indictment.

The Finding of Facts and Conclusions of Law from the Hawaii judgment specifically found there was an agreement[1/] between Boulware, HIE, and Lee that the funds belonged at all times to HIE, not Boulware. The jury's answer to question 10 on the special verdict form[2/] established that the funds belonged to HIE, not Boulware:

> *Question No. 10.* Jin Sook Lee claims the cash and checks delivered to her, during the period from March, 1987 to May, 1994, by Michael Boulware and Hawaiian Isles Enterprises were gifts. Michael Boulware and Hawaiian Isles Enterprises claim the monies were not gifts but were to be held by Jin Sook Lee and to be returned when requested. State your findings below:
>
> The monies were gifts to Jin Sook Lee Yes ____ No ✓
>
> The monies belong to Hawaiian Isle Enterprises Yes ✓ No ____

[1/] "3. There was a binding agreement between Plaintiff, Boulware and HIE to hold monies belonging to HIE to pay Mal Sun Boulware for her marital interest in HIE. Pursuant to that agreement, monies belonging to HIE were entrusted to Plaintiff until such time the monies were needed to pay Mal Sun for her interest in HIE. ER 86.

[2/] Reproduced in *United States v. Boulware*, 384 F.3d 794, 802 (9th Cir. 2004); Pet. App. A9-A10. Supp. ER 12-13.

If the jury had determined instead that the funds belonged to Boulware, not HIE, its answer to whether the monies belonged to HIE would have been "no," not "yes." The jury also distinguished between Boulware and HIE with regard to the $1,200,000 promissary note, in Final Finding 3.[3/] ER 74-75. Contrary to the Ninth Circuit's conclusion, when the totality of the findings in the judgment are viewed together, the ownership of the money as between Boulware and HIE was clearly the subject of adversarial testing. Boulware was bound[4/] by the state court judgment and could not thereafter assert any property interest in the monies and properties. Hence, the Ninth Circuit should have concluded that the state court judgment's determination of property interests was adversarial and binding on the government in petitioner's

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[3/] "As to Count III, judgment in favor of Defendant/Counterclaimant HAWAIIAN ISLES ENTERPRISES, INC. and against Plaintiff on Plaintiff's claim on the August, 1993 promissory note in the amount of $1,200,000 and Plaintiff shall take nothing on said claim against Defendant HAWAIIAN ISLES ENTERPRISES, INC. Furthermore, as to Count III, judgment in favor of Plaintiff and against Defendant/Counterclaimant MICHAEL BOULWARE in the amount of $250,000 on Plaintiff's claim on the August, 1993 promissory note in the amount of $1,200,000[.]"

[4/] Under Hawaii law claim preclusion prohibits a party from relitigating a previously adjudicated cause of action as well as all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided. *Bremer v. Weeks*, 104 Haw. 43, 53, 85 P.3d 150, 160 (Haw. 2004). Since petitioner, as a party to the action, is precluded as a matter of state law from asserting any interest in the properties determined to belong to HIE by the Hawaii judgment, the judgment determined Boulware's interest in the monies and properties at issue.

federal criminal prosecution.[5/]

2. Although acquitted of the substantive false statement counts, petitioner was convicted of conspiring with Lorin Kushiyama to submit false invoices to General Electric Credit Company ("GECC") to divert monies from HIE to petitioner to avoid reporting those monies on his tax return. Kushiyama's intent in submitting the false invoices to GECC was critical in determining whether a conspiracy existed.

The government maintains that the Ninth Circuit correctly concluded that the district court did not impermissibly prevent petitioner from asking Kushiyama whether he "intended to submit false invoices to GECC." Opp. Br. 7. The government argues that the district court concluded that petitioner's question was irrelevant, because it understood petitioner's question, like the questions preceding it, to refer to invoices prepared for third parties. Since petitioner's counsel could have rephrased the question or explained to the district court that he was inquiring about the invoices at issue, the government contends that the district court did not unduly restrict petitioner's right to cross-examine Kushiyama on that point. Opp. Br. 7-8.

This argument should not be accepted. First, it is unclear why the district court sustained the objection, as no "legal ground" was articulated for the objection. 3 RT 59.[6/] Second,

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[5/] As noted in petitioner's Ninth Circuit reply/answering brief and petition for panel rehearing, the government had actual notice of and, as a creditor, had the opportunity to but did not object to the Hawaii judgment serving as the basis for the settlement of Lee's bankruptcy proceeding prior to petitioner's criminal prosecution.

[6/] "Q. As far as these invoices, you are not the -- intending to submit fake invoices to anyone, were you?

Mr. Osborne: Objection, your Honor.

The Court: Sustained. The objection is sustained."

although the district court was emphatic in sustaining this objection, it did not articulate its reason for sustaining the unspecified objection. *Id.* While the government now speculates that the objection was sustained on relevancy grounds because the district court assumed the question was directed to Kushiyama's appraisals for others, neither the government nor the district court articulated those grounds at trial, although the government clearly knew how to do so. 3 RT 56, 57.[7/] Given that the question from defense counsel's point of view clearly referred to the Exhibits at trial and how emphatic the court was in sustaining the objection, it is difficult to imagine that defense counsel would have been given the opportunity to rephrase the question. Third, the question was highly relevant even if defense counsel had intended to refer to invoices prepared by Kushiyama for others.

It is undisputed that Kushiyama's specific intent to submit false invoices was a critical element of the conspiracy to submit false documentation to GECC. Kushiyama, however, testified he had provided appraisals for Boulware, verifying there was sufficient collateral listed in each appraisal (invoice) to cover the amount of money financed by GECC. When defense counsel attempted to question Kushiyama about whether he intended to submit false invoices to GECC, the trial court refused to permit this question. 3 RT 59. This inquiry was critical because petitioner could not be guilty of the conspiracy unless Kushiyama intended to deceive GECC.

The government's reliance on the Ninth Circuit's explanation of the district court's ruling is misplaced. Although the Ninth Circuit correctly observed that

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[7/] "[Prosecutor]: Objection to the relevance of other parties.... Objection to the relevance of what he did --"

Kushiyama had been asked about preparing invoices or appraisals for other individuals, and objections had generally been sustained to these questions, that observation was irrelevant to the question posed to Kushiyama, challenged here, referring to **these invoices.** 3 RT 59; footnote 6, *supra*.

During direct examination, the prosecution admitted into evidence packages of invoices marked as Exhibits 36 and 45. 3 RT 37, 47-48. When defense counsel started cross examining Kushiyama, he referred to these Exhibits, the alleged false invoices, as "these invoices." 3 RT 54, 55, 56, and 58. While counsel asked Kushiyama about appraisals he had prepared for other people, it was clear that counsel's reference to "these invoices" referred to the invoices admitted into evidence and the question asked about submitting fake invoices referred to those Exhibits.

The government mischaracterizes Kushiyama's cross examination. Opp. Br. 7. Most of the questions preceding the question regarding Kushiyama's intent refer to the appraisal he gave for HIE's equipment and whether he used other forms to provide appraisals of equipment. 3 RT 57-58. Kushiyama responded that he used the same types of invoices as in this case and by using these invoices, it did not mean that he was selling equipment to someone. 3 RT 59. The district court sustained the government's objection when Kushiyama was asked if he had ever been asked to do appraisals for anyone else other than HIE. When he was then asked "[a]s far as these invoices," if he intended "to submit fake invoices to anyone," the district court sustained the government's objection. 3RT 59. The questions immediately following asked Kushiyama about the financing between HIE and GECC and whether anyone called from GECC regarding

"these invoices." 3 RT 59-60.[8/]

The government claims that petitioner's argument that the question at issue was relevant even if it was interpreted by the district court as referring to invoices prepared for third parties, was not presented to the district court or the court of appeals and this Court should not pass on this claim in the first instance. Opp. Br. 8. The argument, however, could not have been presented to the district court during trial because no explanation was given for the ruling. Once the Ninth Circuit issued its opinion and stated that it was not completely clear whether "these invoices," referred to those prepared for Boulware or to ones prepared for other customers, the relevancy of invoices prepared for other parties was addressed by petitioner in his petition for panel rehearing.

The Ninth Circuit observed that the district court was under the "impression" that "these invoices" referred to invoices for other parties and defense counsel did nothing to disabuse him of this impression. Pet. App. A32. Therefore, the Ninth Circuit reasoned that the limitation on the cross examination of Kushiyama was not so severe as to amount to a violation of petitioner's Confrontation Clause rights. *Ibid.* But there was no specific finding by the Ninth Circuit with respect to the precise meaning of the question put to Kushiyama regarding any fraudulent intent on his part in preparing the invoices.

After the Ninth Circuit offered some explanation for the district court's ruling, petitioner immediately pointed out the relevancy of the question and its propriety with respect to

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[8/] Petitioner in his Petition for Certiorari incorrectly stated Kushiyama never spoke to representatives of GECC. Pet. 26. In fact, Kushiyama testified he was called by GECC when an error in value was detected on these invoices. 3 RT 60

third parties as a proper subject of cross examination in his petition for rehearing. Hence, the relevancy of the question with respect to third parties and the district court's limitation of cross examination regarding Kushiyama's fraudulent intent in preparing the invoices for other parties is properly before this Court.[9/]

Whether Kushiyama used the forms labeled "invoice" to submit "fake" appraisals or "invoices" for other individuals was highly relevant. If he intentionally submitted fake documents for others, this would support the inference he intended to do so with the invoices admitted into evidence. However, if he never submitted "fake" invoices or appraisals for others, this was circumstantial evidence that he did not intend to do so here. Clearly, petitioner was entitled to cross-examine Kushiyama on this subject. *Davis v. Alaska*, 415 U.S. 308, 318 (1974); *cf. Crawford v. Washington*, 541 U.S. 36, 61[10/] (2004). The failure to allow this cross-examination, whether or not the district court correctly understood the question, denied petitioner his Sixth Amendment right to cross examine Kushiyama because, under either interpretation

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[9/] While Kushiyama's intent with respect to third parties was impliedly addressed when the petition for panel rehearing was denied, this Court may, in any event, consider petitioner's Confrontation Clause claim in the first instance as an exceptional case coming from the federal courts. *United States v. Mendenhall,* 446 U.S. 544, 551-552, n.5 (1980); *Carlson v. Green,* 446 U.S. 14, 17, n.2 (1980); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (*per curium*); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

[10/] "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined."

of the question, the cross examination was highly relevant and critical to the charge and petitioner's defense.

This is particularly true here where Kushiyama was never asked by the prosecutor if he intended to defraud GECC or if he agreed with Boulware to attempt to defraud GECC. Thus, the jury could only rely on speculation to conclude that he had conspired with Boulware. Petitioner was entitled by the Confrontation Clause to expose this "speculation" as the prosecution's wishful thinking. 1 RT 108. The prohibited questioning would have revealed that Kushiyama had no intent to defraud anyone with the trial Exhibits, thereby requiring petitioner's acquittal on the conspiracy.

When the prejudicial spill over from the district court's failure to give binding effect to the state court judgment and the unconstitutional restriction on cross-examination are considered cumulatively, *Kyles v. Whitely*, 514 U.S. 419, 421-422 (1995), it is clear that the conviction on Count 10 must be reversed. When the conviction for Count 10 is reversed, this requires the forfeiture in Count 15 to be vacated, because there is no longer a predicate conviction for the forfeiture.

3. Count 15 sought forfeiture of $495,814.80, the amount of money involved in the allegations regarding GECC, even though that sum, with interest, had been repaid by HIE, and HIE repaid by petitioner prior to June 1993. The government argues that the Ninth Circuit did not address the issue whether the forfeiture order violated the Eighth Amendment and the Ninth Circuit's decision does not present a conflict warranting this Court's review. Opp. Br. 8-9. Although the violation of the Eight Amendment's excessive fines clause was not addressed by the Ninth Circuit, this Court may consider petitioner's Eighth Amendment claim in the first instance as an exceptional case coming from the federal courts. *Capitol Cities Cable, Inc. v. Krisp*, 467 U.S. 691, 697 (1984);